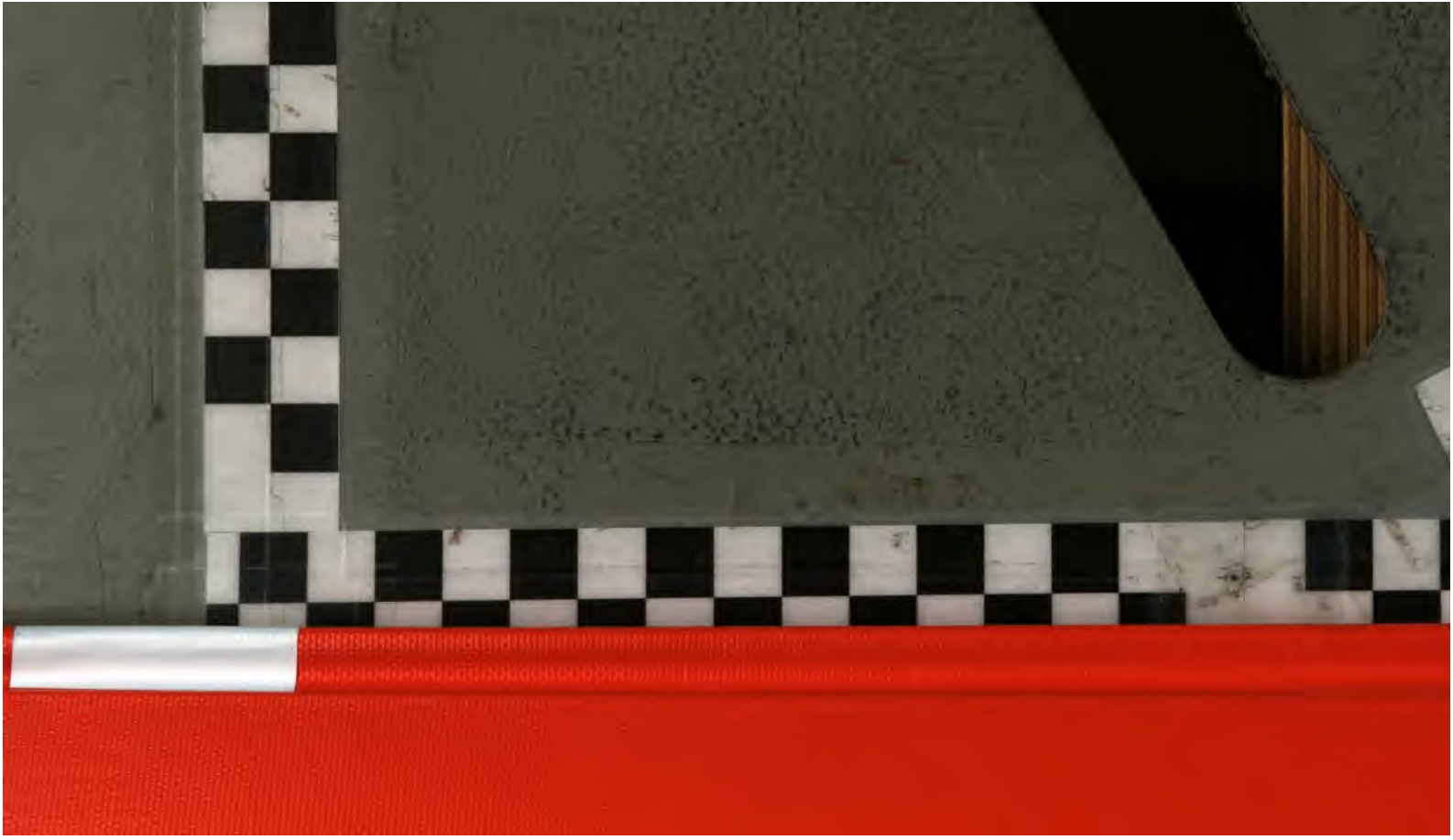

AN

EULOGIUM

UPON THE

HON. WILLIAM TILGHMAN,

LATE CHIEF JUSTICE OF PENNSYLVANIA.

BY

HORACE BINNEY.

AN

EULOGIUM

UPON THE

HON. WILLIAM TILGHMAN,

LATE CHIEF JUSTICE OF PENNSYLVANIA.

BY

HORACE BINNEY.

PHILADELPHIA:

PHILIP H. NICKLIN, LAW-BOOKSELLER.

MIFFLIN AND PARRY, PRINTERS.

1827.

For
Mrs Margaret Bell
with the respectful compliments
of the author.

Philadelphia, July 7, 1827.

DEAR SIR,

Immediately after the death of Chief Justice Tilghman, the Members of the Bar expressed a wish that an Eulogium should be pronounced upon his character; and having passed a Resolution to that effect, they appointed a Committee to make the necessary arrangements. We now request that you will suffer us to impose the duty upon you; feeling as we sincerely do, that we shall thus gratify the anxious desire of our professional brethren, and that justice will be fully done to the merits of the deceased.

With great esteem and respect, your friends and obedient servants,

CHARLES CHAUNCEY.
JOSEPH R. INGERSOLL.
JOHN M. SCOTT.

HORACE BINNEY, Esq.

Philadelphia, July 9, 1827.

GENTLEMEN,

I am extremely sensible of the honour which you have done to me, by the request communicated in your note of the 7th instant. My inability to do justice to the eminent person referred to, ought I fear to deter me from attempting to pourtray his character; but my deep veneration for the virtues and learning of Chief Justice Tilghman, will not permit me, under any sense of my own defects, to question the wishes of my brethren of the Bar.

I am, very faithfully, your friend and servant,

HORACE BINNEY.

CH. CHAUNCEY,
J. R. INGERSOLL,
JOHN M. SCOTT. } Esquires.

At a meeting of the Bar of Philadelphia, held at the Hall of the Circuit Court of the United States, on the 13th day of October, 1827, WILLIAM RAWLE, Esq. *Chairman*, JOHN SERGEANT, *Secretary*,

The following Resolution was unanimously adopted:

Resolved, That the thanks of the Bar be offered to Mr. Binney for his discourse pronounced this day, equally worthy of the profession, the subject, and the speaker; and that he be requested to furnish a copy for publication.

W. RAWLE, *Chairman*.

Attest,

JOHN SERGEANT, *Secretary*.

EULOGIUM.

GENTLEMEN OF THE BAR OF PHILADELPHIA:

IF the reputation of the living were the only source from which the honour of our race is derived, the death of an eminent man would be a subject of immitigable grief. It is the lot of few to attain great distinction, before Death has placed them above the distorting medium, through which men are seen by their cotemporaries. It is the lot of still fewer, to attain it by qualities which exalt the character of our species. Envy denies the capacity of some, slander stigmatizes the principles of others, fashion gives an occasional currency to false pretensions, and the men by whom the age is hereafter to be known, are often too much in advance of it to be discernible by the common eye. All these causes combine to reduce the stock of living reputation, as much below the real merits of the age, as it is below the proper dignity of man; and he who should wish to elevate his spirit by great examples of wisdom, of genius, and of patriotism, if he could not derive them from the illustrious dead, would have better

reason than the son of Philip, to weep at the limits which confined him. To part with the great and good from a world which thus wants them, and not to receive thereafter the refreshing influence of their purified and exalted fame, would be to make Death almost the master of our virtue, as he appears to be of our perishable bodies.

The living and the dead are, however, but one family, and the moral and intellectual affluence of those who have gone before, remains to enrich their posterity. The great fountain of human character lies beyond the confines of life, where the passions cannot invade it. It is in that region, that among innumerable proofs of man's nothingness, are preserved the records of his immortal descent and destiny. It is there that the spirits of all ages, after their sun is set, are gathered into one firmament, to shed their unquenchable lights upon us. It is in the great assembly of the dead, that the Philosopher and the Patriot, who have passed from life, complete their benefaction to mankind, by becoming imperishable examples of virtue.

Beyond the circle of those private affections which cannot choose but shrink from the inroads of Death, there is no grief then for the departure of the eminently good and wise. No tears but those of gratitude should fall into the graves of such as are gathered in honour to their forefathers. By their now unenvied virtues and talents, they have become a new

possession to their posterity, and when we commemorate them, and pay the debt which is their due, we increase and confirm our own inheritance.

We are assembled, my brethren, to pay a part of this debt to one, to whom we shall be greatly in arrear, after we have exhausted all our terms of respect and endearment. We come to honour one who, during a long life, was an honour to his profession and his country. We come to lay claim to his reputation as part of our own, and as an accession to that invaluable estate, which is to pass from generation to generation of this commonwealth, to all future time. It is in obedienoe to your call, that I shall endeavour to show the value of this claim, by a sketch of the life and character of the late Chief Justice Tilghman.

William Tilghman was born on the 12th of August, 1756, upon the estate of his father, in Talbot county, on the Eastern Shore of Maryland, about a mile from the town of Easton.

His paternal great grand-father, Richard Tilghman, emigrated to that Province, from Kent county, in England, about the year 1662, and settled on Chester river in Queen Anne's county.

His father James Tilghman, a distinguished lawyer, is well known to the profession in Pennsylvania, as Secretary of the Proprietary Land-Office, and as having brought that department, by the accuracy of his mind and the steadiness of his purpose, into a

system as much remarked for order and equity, as from its early defects it threatened to be otherwise.

His maternal grandfather was Tench Francis the elder, of this City, one of the most eminent lawyers of the Province, the brother of Richard Francis, author of "Maxims of Equity," and of Dr. Philip Francis, the translator of Horace.

It is not surprising to find among the collateral ancestors of the late Chief Justice, the author of one of the earliest compends of scientific Equity, and a scholar accomplished in the literature of the age of Augustus.

In 1762, his family removed from Maryland to Philadelphia.

In the succeeding year he was placed at the Academy, and in the regular progress of the classes came under the instruction of Mr. Beveridge, from whom he received his foundation in Latin and Greek.

Upon the death of Beveridge, his place was filled provisionally by Mr. Wallis, who was perfectly skilled in the prosody of those languages, and who imparted to his pupils an accuracy, of which the Chief Justice was a striking example.

Dr. Davidson, the author of the grammar, succeeded Beveridge, and with him the subject of this discourse remained, till he entered the College in the year 1769, Dr. Smith being then the Provost, and Dr. Francis Allison the Vice-Provost, the latter of whom instructed the students in the higher Greek and Latin classics; and such was the devotion to

literature of the eminent pupil of whom we are speaking, that after he had received the Bachelor's degree, and was in the ordinary sense prepared for a profession, he continued for some time to read the classics with the benefit of Dr. Allison's prelections.

I record these circumstances, because the Chief Justice himself has recorded them. He seems, throughout life, to have recurred with grateful delight to the studies of his early youth, to which he was able to refer his taste for letters, the bond that united him to society, after almost every other had been painfully broken.

In February 1772, he began the study of the law in this city, under the direction of the late Benjamin Chew, then at the head of his profession, afterwards Chief Justice of the Supreme Court of Pennsylvania, and at the close of the High Court of Errors and Appeals, its venerable President.

In the office of this gentleman, he continued until December 1776, devoting himself to Littleton, and Coke, and Plowden, and the other fathers of the Common Law, at that time the manuals of the legal student, and at no time postponed in his estimation and regard, to the more popular treatises of later days.

From 1776 to 1783, partly on his father's estate, and partly at Chestertown, whither his family had removed, he continued to pursue his legal studies, reading deeply and laboriously, as he has himself recorded, and applying his intervals of leisure to the

education of a younger brother. When, therefore, in the spring of 1783, he was admitted to the courts of Maryland, we may infer that an apprenticeship of eleven years, had filled his mind with legal principles, sufficient to guide and enlighten him for the rest of his life.

In 1788, and for some successive years, he was elected a representative to the Legislature of Maryland. His temper and habits were not perfectly congenial with active political life, nor was he at any time attracted by that career; but he was a republican, in the catholic sense, and took an active part in procuring the adoption of the Federal Constitution, to which as well as to its founders, and great first administrator, he felt and uniformly declared the most profound attachment.

In 1793, a few months previous to his marriage with Miss Margaret Allen, the daughter of Mr. James Allen, he returned to this city, and commenced the practice of the law, which he prosecuted until his appointment by President Adams, on the 3d of March, 1801, as Chief Judge of the Circuit Court of the United States for this circuit.

His powers as an advocate, but more especially his learning and judgment, were held in great respect by this community, surrounded notwithstanding as he was, by men of the first eminence in the land. His law arguments, which some now present may recollect, were remarkable for the distinctness with which he presented his case, and for the per-

spicuity and accuracy with which his legal references were made to sustain it. He was concise, simple, occasionally nervous, and uniformly faithful to the Court, as he was to the client. But the force of his intellect resided in his judgment; and even higher faculties than his as an advocate, would have been thrown comparatively into the shade, by the more striking light which surrounded his path as a judge.

The Court in which his judicial ability was first made known, had but a short existence. It was established at the close of the second Administration of our government; and although this particular measure was deemed by wise men on all sides, and is still cited by many of them, as the happiest organization of the Federal Judiciary, yet, having grown up amid the contentions of party, it was not spared by that, which spares nothing. In a year after its enactment, the law which erected the Court was repealed; and judges who had received their commissions during good behaviour, were deprived of their offices without the imputation of a fault.

An intimate friend of the Chief Justice has informed me, that in all their intercourse, he never knew him allude to the circumstance of having been a judge of that court. There was doubtless a painful recollection connected with it. It is known that his opinion was against the validity of the repealing law; for in a very able protest, published by Judge Bassett, another member of the same court, in which

the breach of the constitution was strenuously asserted, he remarks,—"If any difference between me and my associates in office exists, it relates merely to the point of time for expressing our sentiments. I can confidently assert, that, on deliberation, they coincide with me in other respects."

After the abolition of the Circuit Court, Mr. Tilghman resumed the practice of his profession, and continued it until the 31st July, 1805, when he was appointed President of the Courts of Common Pleas in the first district.

He remained but a few months in the Common Pleas. In the beginning of the year 1806, Mr. Shippen, the Chief Justice of the Supreme Court, yielded to the claims of a venerable old age by retiring from the office, and on the 25th of February, Mr. Tilghman was commissioned in his place by Governor M' Kean, himself a great lawyer and judge, and interested as a father in the court which he had led on to distinguished reputation in the United States.

From the moment of the late Chief Justice's appointment to that of his death, most of us, my brethren, have stood around him, and have witnessed the great work upon which his reputation rests. His life has been on the Bench,—his family has been the Bar,—his children are now before me. So obvious have been his walks to all,—so radiant with that light which is reflected from the path of the just, that no part of them is unknown to you; and I

shall but revive the impressions and assist the recollections of each, while I endeavour to sketch the extent of his labours, the character of his judgments and of his mind, his temper and disposition, social, moral, and religious.

The higher judicial offices in our country, are posts of great distinction, and they owe it to their attendant exertion and responsibility. They put in requisition the noblest faculties of the mind, the finest properties of the temper, and not unfrequently they task to the utmost the vigour of an unbroken constitution. Very few, if any, of their duties are mechanical. There is no routine by which their business is performed without the expenditure of thought. The cases which come before the Judges are new either in principle or in circumstance; and not seldom the facts which ask for the application of different principles, are in the same cause, nearly in equipoise. There is consequently an interminable call upon the Judge to compare, discriminate, weigh, adopt, reject, in fine to bring into intense exercise his whole understanding. Where the profession is candid and well instructed, nothing that is obvious, and little that can be made so without deep consideration, is referred to the decision of the Judges. For them the universal intelligence of the world is at work to complicate the contracts and the duties of men. For them are reserved those Gordian knots, which, although others may cut, they must at least appear to untie. Every judgment is made under

great responsibility to the science;—it must be a rule for the future, as well as for the past. It is made under an equal responsibility to the parties;—the Judge is the defaulter, when through his means the defaulter escapes. It is under a higher responsibility to heaven;—the malediction of an unjust sentence is heavier upon him that gives, than upon him that receives it.

He who, through a large portion of the short life of man, properly sustains such an office, studying all his causes with the intenseness of personal interest,—improving the science by adding daily confirmation to the defences of liberty, reputation and property,—and at the last standing clear in his great account of justice impartially administered to the poor and the rich, the guilty and the innocent,—he that does this is entitled to all the homage which man ought to render to man, and may claim, but not till then, to stand by the side of our venerated Tilghman.

From the time that he took his seat on the Bench at March Term 1806, for the space of more than ten years, he delivered an opinion in every case but five, the arguments in four of which he was prevented from hearing by sickness, and in one by domestic affliction; and in more than two hundred and fifty cases, he either pronounced the judgment of the Court, or his brethren concurred in his opinion and reasons without a comment.

His attention from the beginning to the end of the twenty-one years that he presided in the Supreme Court, was undeviatingly given to every case; and he prepared himself for all that required consideration at his chambers, by taking an accurate note of the authorities cited by counsel, and of the principal heads and illustrations of their argument.

This labour was not performed to accumulate the evidences of his devotion to business, nor under subjection to an inveterate habit. He was far above all this. He did it under a sense of conscientious duty to retain such minutes as would enable him to examine the authorities, and to review the observations of counsel, after the illusion and perhaps the excitement of the public discussion had gone by. The contents of twenty volumes of reports, and upwards of two thousand judgments, most of them elaborate, all of them sufficiently reasoned, very few upon matters of practice, or on points of fugitive interest, attest the devotion of his judicial life; and although it is not meant to deprive of their share of the merit of these labours, the eminent men who survive him on the Bench, and who remain to continue and I hope to exalt the fame of our jurisprudence, I may say, and they will cheerfully admit, that he was the presiding spirit of their consultations, as he was of their court.

In addition to these strictly official duties, the Legislature of Pennsylvania, committed to the Judges of the Supreme Court, in the year 1807, the critical

duty of reporting the English statutes in force within this commonwealth. The duty is called *critical*, for so undoubtedly it was considered by the Chief Justice. The service exacted an unlimited knowledge of our colonial legislation, and of the practice and administration of the law in the Province, through a period of nearly a century, in which there was not the light of a reported case. It required also an intimate familiarity with the written law of England, its history both political and legal, and a knowledge of the impressions which it had given to and received from the common law, during the course of many centuries. The selection moreover was to be made in the chambers of the Judges, without the aid of that best of all devices for eliciting the truth, an ardent, free, and ingenuous discussion by counsel. I need not say to the professional hearer, that the task was Herculean. In the course however of less than two years, it was performed; and the profession and the public are indebted to it for an invaluable standard of reference in a province of the law, before that time without path or guide. It is not perfect. It has not the obligation of judicial authority. I speak the sentiments of its principal author. Some statutes are perhaps omitted. Still the original work will remain as a monument to those by whom it was erected, and who may now be said to rest beneath it. If it shall increase at all, it will be by the contributions which the hand of respect

and affection shall bring to swell the tribute to the venerable dead.

The labours thus recited, my brethren, in addition to what we know to have been performed at Nisi Prius, and in Circuits through the State, entitle this eminent Judge to the praise of great industry, a virtue which it is an offence against morality to call humble, in one who is the keeper both of his own talent, and not seldom of that of others also. It was, however, industry of the highest order—a constant action of the intellect practically applied.

But the character of his mind as it shines forth in his judgments, is a subject of much livelier interest.

The first great property which they disclose, is his veneration of the law, and above all, of the fundamental Common Law. There is not a line from his pen, that trifles with the sacred deposit in his hands, by claiming to fashion it according to a private opinion of what it ought to be. Judicial legislation he abhorred, I should rather say, *dreaded,* as an implication of his conscience. His first inquiry in every case was of the oracles of the law for their response; and when he obtained it, notwithstanding his clear perception of the justice of the cause, and his intense desire to reach it, if it was not the justice of the law, he dared not to administer it. He acted upon the sentiment of Lord Bacon, that it is the foulest injustice to remove landmarks, and that to corrupt the law, is to poison the very fountain of justice. With a consciousness that to the errors of the science there are some limits, but

none to the evils of a licentious invasion of it, he left it to our annual legislatures to correct such defects in the system, as time either created or exposed: and better foundation in the law can no man lay.

Those who study his opinions, while they may remark that he was unusually sparing of references to authority, will find that it was the result of selection and not of penury. He was not, however, what is sometimes termed a great case-lawyer. His memory did not appear to be tenacious of insulated decisions; nor is it usual for men of philosophical minds, who arrange the learning of their profession by the aid of general principles, to be distinguished by their recollection of particular facts. With the leading cases under every head, those which may be called the *light-houses* of the law, he was familiar, and knew their bearings upon every passage into this deeply indented territory; but for the minor points, the soundings that are marked so profusely upon modern charts of the law, he trusted too much to the length and employment of his own line, to oppress his memory with them. It was not his practice to bring into his judgments, an historical account of the legal doctrine on which they turned, nor to illustrate them by frequent references to other codes, to which, nevertheless, he was perfectly competent by the variety as well as by the extent of his studies. His preference was rather to deduce the sentence he was about to pronounce, as a logical consequence from some proposition of law which he had previously stated and settled with

great brevity. No Judge was ever more free both in mind and style from every thing like technicality. He never assigned a technical reason for any thing, if another were at command, or if not, without sustaining the artificial reason by an explanation of its grounds. At the same time his knowledge embraced all the refinements of the law, and he took an obvious satisfaction in showing their connection with substantial justice.

His judgments are further distinguished by perspicuity, precision, and singleness.

No careful reader was ever at a loss for the meaning of the Chief Justice, and his whole meaning. His language is transparent; you see through it, instantly, the purpose of the writer. There is no involution, no parenthesis, no complication. Every thing is direct, natural, and explicit. His style without being dry, and possessing upon proper occasions such embellishments even, as a severe and critical taste would permit, is made up, in general, of terms and phrases so entirely ascertained in their meaning, as to defy the extraction of a double sense,—an excellence of the very first order in judicial compositions. This precision, was the result of an accurate adjustment of the argument before he committed it to paper. His opinions, such as they appear in the earliest reports of them, and I presume the same of the whole, were published from the first draught, in which it was rare to find either erasure or interlineation; and I recollect no instance in which he was asked by counsel, or induced by his own review, to give an explanation of them.

This was, indeed, a natural consequence of that singleness, to which I have alluded as a striking feature of his judgments. He paid little respect to what are called *dicta*, opinions collateral to the matter in judgment, from whatever quarter they might come. He pronounced none himself. His concern was with the point in issue, and nothing else; and he kept his eye on that, as a mariner does upon the Pole-star.

All his opinions are, moreover, remarkable for their admirable common sense, and their adaptation to the common understanding. There is no reaching after what is recondite, or abtruse,—no affectation of science. The language of the law, as he uses it, is vernacular, and his arguments are the most simple that the case will bear. They are not an intricate web, in which filaments separately weak obtain strength by their union, but a chain, whose firmness arises from the solidity of its links, and not from the artifice of their connexion.

But that quality which exalts his judgments the most in the estimation of the public, is the ardent love of justice which runs through them all. His appetite for it was keen and constant; and nothing could rouse his kind and courteous temper into resentment, more than a deliberate effort to entangle justice in the meshes of chicane. The law was his master; he yielded implicit obedience to its behests. Justice was the object of his affections; he defended her with the devotion of a lover. It is the high praise of his administration, and of the profession too, that the occasions were rare in which his efforts did not bring them into harmonious co-operation.

Is it not worthy of remark, that judgments such as these, which enjoyed universal respect, were nevertheless, free from every thing like pretension? Chief Justice Tilghman could have done as much with this Bar, by the force of his authority, as any Judge that ever sat in his seat. His investigations were known to be so faithful, his reasonings so just, and his convictions so impartial, that there would have been a ready acceptance of his conclusions, without a knowledge of the steps which led to them. He asked however, for submission to no authority, so rarely as to his own. You may search his opinions in vain, for any thing like personal assertion. He never threw the weight of his office into the scale, which the weight of his argument did not turn. He spoke and wrote as the minister of reason, claiming obedience to *her*, and selecting with scrupulous modesty such language, as while it sustained the dignity of his office, kept down from the relief, in which he might well have appeared, the individual who filled it. Look over the judgments of more than twenty years, many of them rendered by this excellent magistrate after his title to unlimited deference was established by a right more divine than that of Kings,—there is not to be found one arrogant, one supercilious expression, turned against the opinions of other judges, one vain glorious regard toward himself. He does not write as if it occurred to him, that his writings would be examined to fix his measure, when compared with the standard of great men, but as if their exclusive use was to assist in fixing a standard of the law.

It is to all these qualities that Chief Justice Tilghman owed the confidence of his brethren on the Bench. It does not occur to me at present, that his opinion at Nisi Prius or on the Circuit was ever overruled, nor that his judgment in Bank was made ineffectual by a majority of the Court, except in a single instance; and it will not be deemed offensive to say, that when the same question shall recur, it will probably be considered without any decisive influence from this unsupported case.

If the common law were a science, in which the mind of a Judge might speculate without impediment, as in some others, it would be natural to ask, what new principles he has added to the code, or what new combinations he has made to increase its vigour. It is such an inquiry that imparts interest to the biographical notices of men, who have been eminent in Physics, in the higher branches of the Mathematics, and emphatically of such as have been distinguished actors in the formation of political Constitutions, or of new codes of law. There is a freedom and expansiveness in some parts of Science, that even imagination may be invited to attend upon genius as it explores them; and the Legislator especially, or the founder of new governments, is so little restrained in his movements, that the personal character of the individual becomes the pervading soul of the work, and looks out from every part of it. But the law, as a practical science, depends mainly for its value, upon retaining the same shape and nearly the same dimensions from day to day. A speculative,

inventive, imaginative Judge is a paradox. No one can reasonably ask what a Judge has invented or devised, or even discovered. His duty and his praise are in the faithful administration of a system created to his hands; a system of principles, the just development of which affords sufficient scope for genius, without destroying what is established, or innovating in the spirit of a law giver. If ever his labours approach the merit of discovery, it is when he reforms or brings to light what had a previous existence, but had been perverted or obscured.

In some particulars of great interest to the profession, the late Chief Justice had the merit of relieving our code from perversion and obscurity of this description. He has certainly reinstated a statute of indispensable use, and which was imperceptibly giving way to judicial legislation here, as it has thoroughly done in England, the Statute of Limitations in actions of assumpsit. On this subject he distinctly led the way in Pennsylvania; and in every particular in which he was not restrained by authority, he has brought our Courts back to the true interpretation. He has, as it were, reclaimed this resting place for the unfortunate, from an irruption of the ocean.

He led the way also, and has resolutely persevered, in opening the large rivers of this Commonwealth, to the great work of public improvement, by rejecting the inapplicable definitions of the English common law, which would have subjected them to the claim of the riparian owners.

He has followed up that work which his father is said to have begun, by giving the force of his mind and influence to the establishment of such rules, as make the Land Office system harmonize with every other part of our code.

But his great work, that at which he laboured with constant solicitude, but with scarcely a passing hint that he was engaged in it, is the thorough incorporation of the principles of scientific equity, with the law of Pennsylvania, or rather the reiterated recognition by the Bench, that with few exceptions they form an inseparable part of that law.

The distinction between law and equity is well understood by the Profession, but difficult to explain to popular apprehension. It is a great but prevalent mistake, to suppose that a Court of Equity is the reproach of the common law, whereas it is its praise, at least the praise of its illustrious origin. The Common Law, being originally the law of freemen, of that Saxon stock from which is derived the freest race upon earth, left nothing to the discretion of the Judge or the Monarch. It was itself the great arbiter, and ruled every question by principles of great certainty and general application. In its earliest day, a day of comparative simplicity, its general principles and forms embraced and adjusted almost every transaction: and when they did not, the authority of the Common Law Courts was legitimately extended by new writs devised in the then incipient Chancery. The refinements of later times, the invention of uses, and afterwards of trusts,

the complications of trade, the defects incident to the multiplied operations of men, all tended to produce controversies which the Judges of the Common Law could not, consistently with their integrity and the integrity of their rules, adjust with perfect effect; and hence the development of the Court of Chancery. It is a great misconception of that Court, to suppose that it overturns the Common Law. Equity is a part of the Common Law; and a Court of Chancery is the homage paid by a free Constitution to the integrity of the Courts of Common Law. It is the handmaid of those Courts. It restrains dishonest men from applying the general rules of those tribunals to cases which they ought not to embrace,—it extends to the upright the benefit of a rule of those Courts, of which a defect in circumstance deprived them,—and it attains its purposes by a process, between parties, and through a method of relief, almost necessarily different from those of the Courts of Common Law, but in perfect analogy with what the rules of those Courts effect where they properly apply. It is no more the reproach of the Common Law, that it has a department of Equity, than that it has a department of Admiralty Law, or of Ecclesiastical Law. There is no more reason why the original constitution of the Courts of Common Law should be destroyed, by blending with their principles and practice, the rules of a Court of Chancery, than by uniting with them the rules of the Admiralty. It is a question of having two Courts to execute different parts of the same system, instead of one; and the

experience of England, and of most of these States, is better than volumes, to show, that the purity and vigour of both law and equity, are maintained by preventing their intercourse in the same tribunal. That their separation is unfriendly to the people, is refuted by the great examples of Maryland, Virginia, and New York, and by the example of all the States in their Federal capacity.

It is the misfortune of Pennsylvania that the want of a Court of Chancery has left her tribunals no alternative but that of attempting this difficult incorporation. Her Chancery history is short and striking.

There was no such Court among the institutions of William Penn, or of his day. That this was the consequence of a jealousy of the principles and practice of that Court entertained by the people, is not indicated by their early juridical history. It was more probably owing to a question connected with the introduction of the Court, and under the influence of which it met an early fate,—in whom, according to the constitutional law of that day, the office of Chancellor ought to vest, and whether it could be legally executed except by one, who, under the great seal of England, acted as the king's representative. The prerogative lawyers of the colony held the negative of that question; yet the alleged necessity for the Court was such, and such the attachment to both its forms and principles, that the Legislature, by a mere resolution, requested Sir William Keith, to hold a Court of Chancery, and it

was accordingly opened under the proclamation of that Governor, in August 1720. During the rule of a less popular Governor in 1736, the organization of the Court was denounced by the assembly as a violation of the Charter of Privileges, and at the same session a Bill was sent up for the approbation of Governor Gordon, establishing Superior and Inferior Courts of Equity in the ordinary way. The prerogative objection recurred, it became a party question, the Bill was not approved, Chancery powers were no further exercised, and Pennsylvania lost the system, because her Governors and representatives could not agree by whom the office of Chancellor should be held.

It may be supposed that the circles of this party feud grew larger as they advanced, and that they finally encompassed the Court itself. Such probably was the case at the commencement of the revolution. Scientific Equity fell under general proscription, and with some few exceptions was made to give place to a spurious equity, compounded of the temper of the judge, and of the feelings of the jury, with nothing but a strong infusion of integrity, to prevent it from becoming as much the bane of personal security, as it was the bane of science.

It was to expel this usurper, that the days and nights of Chief Justice Tilghman were devoted,—a work suggested it is true by that distinguished predecessor to whom he owed his office, but consummated by himself and his colleagues, to whom we owe a debt not to be acquitted, for having fully established the

principles of methodized and scientific equity in their just sway, as a part of the common law of the land.

He achieved this work, at the same time, without the slightest innovation upon legal forms, upholding them on the contrary as the only instruments for the administration of equity, except where the Legislature otherwise directs. No one ever knew him usurp a power of any kind, still less a power of Chancery, of which, his very affection for the system seemed to make him apprehensive. He has expressed the opinion, that the Legislature would, at no distant day, find it expedient to provide for Trusts, as well as for other subjects of Chancery jurisdiction; but, in the mean time, he has taught us how to clothe a large body of equity principles in the drapery of the law. In those cases, in which Equity consists in the very methods of her administration, the Chief Justice looked for final relief from the representatives of the people; and he waited patiently, and was content that they should wait, the instruction of time. Is the hope vain, that the opinion of this pure and enlightened Judge, may be received instead of that instruction?

Let it not be supposed, however, because he was deeply imbued with the principles of Equity, that he was therefore latitudinarian. His Equity was as scientific as his Law. It was the Equity of the Hardwickes, the Thurlows, and the Eldons of England, of the Marshalls, the Washingtons, and the Kents of the United States:—an equity without discretion, fixed

as the principles of the Common Law, and like it, worthy of the freemen of whose fortunes it disposes.

It is in the points already noticed, without referring to a mass of invaluable adjudications on particular questions of law, that the late Chief Justice has made an impression upon the science in this commonwealth. His influence upon it, cannot be forgotten. He will not be remembered merely as an upright and able Judge, who has maintained the dignity of his profession and office, but as one who has stamped his peculiar principles and modes of thought upon the code, and who has imparted to it as much of the philosophical cast of his own mind, as could with safety be carried into a science, that is as well a science of authority, as it is of principles.

In the department of Penal law he was relieved by his office from frequent labours, although he annually presided in a Court of Oyer and Terminer for this county. His knowledge of this branch of the law was extensive and accurate; his judgment in it, as in every other, was admirable. His own exemption from moral infirmity, might be supposed to have made him severe in his reckonings with the guilty; but it is the quality of minds as pure as his, to look with compassion upon those who have fallen from virtue. He could not but pronounce the sentence of the law upon such as were condemned to hear it; but the calmness, the dignity, the impartiality, with which he ordered their trials, the deep attention which he gave to such as involved life, and the touching manner of his last

office to the convicted, demonstrated his sense of the peculiar responsibility, which belonged to this part of his functions. In civil controversies, such excepted, as by some feature of injustice demanded a notice of the parties, he reduced the issue pretty much to an abstract form, and solved it as if it had been an Algebraic problem. But in criminal cases, there was a constant reference to the wretched persons whose fate was suspended before him; and in the very celerity with which he endeavoured to dispose of the accusation, he evinced his sympathy. It was his invariable effort, without regard to his own health, to finish a capital case at one sitting, if any portion of the night would suffice for the object; and one of his declared motives was to terminate, as soon as possible, that harrowing solicitude, worse even than the worst certainty, which a protracted trial brings to the unhappy prisoner. He never pronounced the sentence of death without severe pain; in the first instance it was the occasion of anguish. In this, as in many other points, he bore a strong resemblance to Sir Matthew Hale. His awful reverence of the great Judge of all mankind, and the humility with which he habitually walked in that presence, made him uplift the sword of justice, as if it scarcely belonged to man, himself a suppliant, to let it fall on the neck of his fellow man.

My brethren, we may be permitted to say, that these properties of a great Judge, were adorned by manners, the combined effect of a benevolent heart, and of a fine education, which made his intercourse with the

Bar, and theirs with him, an unbroken circle of affection and respect. The practice of the law is not without its trials to a Judge of the happiest temper. The efficiency of the advocate, in some causes, depends upon his giving the rein to his ardour, and in moving with a velocity which kindles others as well as himself. These rapid movements are unfriendly to a nice selection of phrases, and to that deference to the opposing sentiments of the Court, which the due order of a judicial tribunal demands. It argues little against the Judge or the advocate, that in cases like these, there should be momentary lapses of the temper. But whose memory is so unfaithful as to record one such incident in the judicial life of Chief Justice Tilghman? He knew the respect of the Bar for him to be so cordial, that he never suspected offence; and they knew his integrity and fidelity to the law to be such, that they never placed his judgment on any occasion, to the account of prejudice, partiality, or impulse. The reign of sound law and impartial justice in the Supreme Court of the State, has therefore been the reign of courtesy and kindly feelings between the Bench and the Bar; and though dead, he will continue to speak as if living, in favour of this natural and delightful union.

Upon the whole, his character as a Judge, was a combination of some of the finest elements that have been united in that office. Among those which may be regarded as primary or fundamental, were a reverential love of the Common Law, and a fervent zeal for justice, as the end and intended fruit of all law. The

former was enlightened by laborious study in early life, the latter was purified, like the constitution of his whole mind, by a ceaseless endeavour to ascertain the truth. In the service of these exalted affections, he never faultered. His effort in every cause was to satisfy them both; and by attention to the researches of others, patient inquiry for himself, and a judgment singularly free from disturbance of every kind, he rarely failed to attain his object. Other Judges may have had more learning at immediate command,—none have had their learning under better discipline, or in a condition more effective for the duty on which it was employed. His mind did not flow through his opinions in a stream of exuberant richness, but its current was transparently clear, and its depth was never less than the subject required, however profound. He was moreover equal to all the exigencies of his office, and many of them were great, without any such exertion as appeared to disturb the harmony, or even the repose, of his faculties; and he has finally laid down his great charge, with the praise of being second to none who have preceded him in it, and of leaving his countrymen without the expectation or the desire of seeing him surpassed by those who shall follow him.

The judicial faculties and virtues which I have thus endeavoured to sketch, could never have been the companions of disorder in the mind, the affections, or the life of the individual. My Lord Coke has

made to the aspiring student of the Law, this striking appeal, too flattering perhaps, except while the venerable portrait of the late Chief Justice is still before us: "Cast thine eye upon the sages of the law that "have been before thee, and never shalt thou find any "one that hath excelled in the knowledge of these "laws, but hath drawn from that divine knowledge, "gravity, and integrity." He pronounces this knowledge to be irreconcileable with a loose and lawless life, and gives the result of his large experience, that he had never seen any man of excellent judgment in the Common Law of England, "but was withal, being taught by such a master, honest, faithful, and virtuous." The Chief Justice was not only thoroughly taught by this master, but he came into the school accomplished in elegant learning; and long before he left it, there was associated the training of another school, worthier far than the Common Law, of the exalted eulogy of Sir Edward Coke.

His early education, it has been remarked, was excellent. He was an accomplished Latin scholar, but, to his own regret, had suffered his Greek to fall away by desuetude. The literature of the former language, he kept constantly fresh in his mind. His memory was stored with beautiful Latin, which he has been heard to repeat as it were to himself, when the occasion recalled it, and his modesty did not care to pronounce it aloud. On all his Circuits and journies into the districts of the Supreme Court, his companions were the BIBLE, a Latin author, and some recent

treatise of distinction in the law. Upon the last that he ever made, he refreshed his recollections of the Pharsalia. It is perhaps no idle fancy to suppose that he may have then read, with almost a personal application, the prophetic appeal of the Spectre to the race of Pompey:

——— veniet quæ misceat omnes
Hora duces. Properate mori———

Such a name and such an example, are of great efficacy in the inquiry concerning the fittest basis of liberal education. All the faculties of his mind were thoroughly developed,—he accumulated large stores of knowledge,—he brought them into daily use,—he reasoned accurately,—he conversed elegantly,—his taste was refined,—the pleasures which it brought to him were pure,—his imagination was replete with the beautiful forms of ancient poetry,—he was adequate to the functions of one of the most exalted offices,—he knew little of the natural sciences,—and his education was such as has been described. It would be unjust to him, however, to say that he undervalued knowledge of any kind, and least of all that knowledge which is opening every day to the world, and to this part of the world especially, new sources of wealth, and new proofs of the wisdom and beneficence of Deity. On the contrary, with that diffusive liberality for which he was conspicuous, he gave his counsel and his money to every plan for increasing this species of knowledge; but it cannot be asserted of him, that he

recommended it in any of its branches, as an instrument for unfolding the faculties of youth. He regarded these sciences as treasure for accumulation, after education had performed its office. For the great work of training the minds of young men to liberal pursuits, and to the learned professions, his opinion was anchored upon the system, by which he had been reared himself,—the system of the American Colleges.

While the Chief Justice continued his intercourse with the learned ancients, he found leisure in the intervals of office, for the literature of his own language, in which he was extensively versed, and for which he possessed the keenest relish; and it is to these two sources that he owed the purity of his style, where nothing coarse or vulgar ever appeared, and which, without being affected or elaborate, was remarkable for the absence of all words of questionable authority.

His moral qualities were of the highest order. It has been said, that the panegyrists of great men can rarely direct the eye with safety to their early years, for fear of lighting upon the traces of some irregular passion. But to the subject of this discourse, may with justice be applied, the praise of the Chancellor D'Aguesseau, that he was never known to take a single step out of the narrow path of wisdom, and that although it was sometimes remarked he had been young, it was for the purpose not of palliating a defect, but of doing greater honour to his virtues. Of his

early life, few of his cotemporaries remain to speak; but those few attest, what the harmony of his whole character in later years would infer, that his youth gave presage by its sobriety and exemplary rectitude, of all that we witnessed and admired in the maturity of his character. It is great praise to say of so excellent a Judge, that there was no contrariety between his judgments and his life,—that there was a perfect consent between his public and his private manners,—that he was an engaging example of all he taught,—and that no reproach which, in his multifarious employment, he was compelled to utter against all the forms of injustice, public and private, social and domestic,—against all violations of law, from crime down to those irregularities at which, from general infirmity, there is a general connivance,—in no instance, did the sting of his reproach wound his own bosom. Yet it was in his life only, and not in his pretensions, that you discerned this his fortunate superiority to others. In his private walks he was the most unpretending of men. He bore constantly about him those characteristics of true greatness, simplicity and modesty. Shall I add, that the memory of all his acquaintance may be challenged to repeat from his most unrestrained conversation, one word or allusion, that might not have fallen with propriety upon the ear of the most fastidious delicacy.

His manners in society, were unusually attractive to those who were so fortunate as to possess his

esteem; and they were the reverse to none, except those who had given him cause to withhold it. Their great charm was sincerity; and though unassuming and retired, they never failed to show the impress of that refinement in which he had passed his life.

The kindness of his nature appeared in the intercourse that he maintained with his fellow citizens, notwithstanding the claims of his station. He probably entertained Mr. Burke's opinion, that *as it is public justice that holds the community together, the Judges ought to be of a reserved and retired character, and wholly unconnected with the political world.* He certainly acted up to all that the sentiment asserts; and he found the benefit of it, the community did also, in a ready submission to those judgments, more than one, in which a suspected infusion of party would have been a disturbing ingredient. No one who knew him in private life, had however any reason to doubt his opinions, when the occasion fitly called for their expression. Not deeming it discreet to meet his fellow citizens in those assemblies where either politics or their kindred subjects were to be discussed, he seized with the more avidity, such occasions of intercourse, as were presented by meetings for public improvement, for philosophical inquiry, or the cultivation of literature; and in particular he attended with great interest to the concerns of the American Philosophical Society, of which he was chosen President, on the death of Dr. Patterson, in the year 1824, and to those also of the

Athenæum, of which he was the first, and during his life, the only President:—the Trustees of the University of Pennsylvania rarely missed him from his seat, or the United Episcopal Churches, of this City, from their Vestry, as the Warden of his venerable friend and pastor Bishop White. It was in this way that he diminished the distance to which his office removed him from society; keeping however a constant eye upon that office, even when he moved out of its orbit, and taking scrupulous care, that no external contact should be of a nature to disturb his movements when he returned to it.

It was upon an occasion when a very delicate question agitated the country, that he mentioned to a friend a transaction in his life, which, although in a certain sense public in its character, is even at this time not extensively known. His reason for adverting to it, illustrates in a striking manner his deference to the demands of his station; while the passage in his life to which it refers, discloses his sentiments upon the embarrassing question of negro slavery: a question however upon which, in some of its practical bearings, he thought it an act of infinite rashness to judge other men, and in regard to which he almost concealed his own decided proceeding, lest it should appear to reproach the judgment of his kinsmen and friends.

Having been asked to take part in a public meeting in this city upon what has been called the Missouri question, he thought it expedient to decline. "My office," he said, "compels me often to decide upon

this irritating question of slavery; and it is not expedient to take part in a public discussion, that might bring my impartiality into doubt. No one who knows the arrangement that I have made with the slaves which belonged to me, will doubt my fervent wish to see the evils of this institution mitigated, and, if possible, extinguished." The arrangement was an instrument executed on the 24th of April, 1811, by which he emancipated four of his slaves immediately, nine others in successive periods of from three to seven years, and the residue, twenty-five in number, together with their issue, on the first day of January after they should respectively attain the age of twenty-eight years. There was but one prescribed impediment to this emancipation,—unlawful absence from duty, wilfully or by imprisonment for crime; in which case the party's freedom was deferred for treble the term of his absence. The benevolent proprietor lived to see this emancipation attained by twenty, and he has secured its benefit to those that remain. He has secured it in the best way, by making it the reward of fidelity and virtue, and by so regulating it both as to time and numbers, as to give its objects the best chance of establishment in the community.

The temper of the Chief Justice was singularly placable and benevolent. It was not in his power to remember an injury. A few days before his death, he said to two of his friends, attendant upon that scene, "I am at peace with all the world. I bear no ill-will "to any human being; and there is no person in ex-

"istence, to whom I would not do good, and render a "service, if it were in my power. No man can be "happy who does not forgive injuries which he may "have received from his fellow-creatures." How suitable was this noble conclusion to his exemplary life! What a grace did this spirit impart to his own supplications! This was not a counterfeit virtue, assumed when the power to retaliate was wasted by disease. It was not the mere overflow of a kindly nature, unschooled by that divine science which teaches benevolence as a duty. It was the virtue of one, who, in his eulogium upon his eminent friend Dr. Wistar, who had filled the Chair of the Philosophical Society, thus made known the foundation on which his benevolence was built. "Vain is the splen-"dour of genius without the virtues of the heart. No "man who is not *good*, deserves the name of *wise*. In "the language of Scripture, folly and wickedness are "the same; not only because vicious habits do really "corrupt and darken the understanding, but because "it is no small degree of folly to be ignorant, that the "chief good of man is to know the will of his creator, "and to do it."

It was under the influence of this sentiment, that his fortune became a refuge to the unfortunate, far more extensively than his unostentatious manners imported. Notwithstanding the panoply which protected him from the assaults of this world, he was like the feeblest of his race, naked and defenceless against the dispensations of Heaven. His bosom suffered many and deep

lacerations; but they had the propitious effect of opening his heart to mankind, instead of withering and drying up its affections. He was gentle, compassionate, charitable in many of the senses that make charity the first of virtues; and long after his leaves and branches were all torn away, there was more than one that reposed in the shade of his venerable trunk. His closing years finely illustrated the remark, that the heart of a good man is like a good soil, which is made more fertile by the ploughshare, that tears it and lays it open,—or like those plants which give out their best odours when they are broken and crushed.

An interesting record which this venerable man has left behind him, acquaints us with many of his most private thoughts, and presents him in a relation which no man can renounce, and which, when duly observed, is the appropriate light wherein to behold an eminent Judge,—the relation of man to his Creator.

His birth day, the 12th of August, was habitually appropriated to the review of the past year, to self-examination, and to intercourse with God; and it will not be deemed irreverent in us, the only children he has left, to cast an affectionate eye upon this record, and to draw encouragement and counsel, as well as increased veneration for his character, from the touching disclosure it makes of his fortitude, resignation, and piety.

The first of the series which has been found, begins on the 12th of August, 1804, when he completed his forty-eighth year. He says—"my health is good, my

constitution unimpaired, but I am deeply impressed with the uncertainty of life. Let me prepare to follow the numerous friends who have left this world before me."—"The last stage of my residence on earth is approaching. Time is precious. I must not suffer it to be wasted in indolence, or thrown away on light amusements. I have endeavoured during the course of this day to strengthen my mind with virtuous resolutions, and I hope my endeavours have not been useless." He then repeats the resolutions he had formed for the government of his life, among which is that of "letting no day pass without prostrating himself before the Supreme Being, in meditation, thanksgiving, and prayer;" and he concludes his memorial by offering, as he expresses it, "with a grateful heart, his unworthy thanks to the almighty and merciful God, for past favours, far exceeding his merits," and by "imploring with all humility, that he would graciously assist his weak endeavours to keep the resolutions he had made."

He continues this review for several years, during which his strain is that of gratitude for constant benefactions: but in the year 1817, the clouds gathered around him, the countenance of his beneficent creator seemed to be withdrawn, and the night of his old-age was approaching, with the promise of but one feeble and ill-assured ray to relieve it from total darkness. He had been one of ten brothers and sisters, to all of whom he had borne the tenderest affection. He had been a husband, enjoying for a short time the happiness of that sacred relation. He had been the father

of one child; devotedly loved for her intelligence, filial affection, and piety. Mark with what a celestial temper, if I may so speak, he records the flight of all these blessings. "I have now attained the age of sixty-one, and have survived parents, brothers, sisters, wife, and child. But few of my dearest connexions remain in this world. May this reflection induce me so to use the short remainder of my life, as may recommend me to thy favour, and procure me the happiness of once more meeting my departed friends, according to my confident hope. Lord thou hast taken away the child which thou hadst given me. I murmur not. Blessed be thy name."

Before the 12th of August, 1820, that feeble ray which was promised to his declining days, was extinguished. The only child of his only daughter was taken from him. Yet observe, how the light of the divine philosophy shone inward, and dispelled the gloom in which unassisted man would have sunk to despair. "Great God, during the last year, thou hast thrown me on the bed of sickness, and raised me up from it. Thou hast taken from me, my last earthly hope. I submit to thy providence, and pray that thou will grant me fortitude under all my afflictions. I am sure that whatever is ordained by thee is right. May I never forget that thou art always present, the witness and judge of my actions and thoughts. My life is hastening to an end. May I, by thy gracious assistance, so employ the remainder of it, as not to be altogether unworthy of thy favour."

On the last anniversary that he ever saw, he begins his paper with the prophetic declaration, "this day completes my seventieth year, the period which is said to bound the life of man. My constitution is impaired, but I cannot sufficiently thank God, that my intellects are sound, that I am afflicted with no painful disease, and that sufficient health remains to make life comfortable. I pray for the grace of the Almighty, to enable me to walk during the short remnant of life in his ways. Without his aid I am sensible that my efforts are unavailing. May I submit with gratitude to all his dispensations, never forget that he is the witness of my actions and even of my thoughts, and endeavour to honour, love, and obey him, with all my heart, soul, and strength."

It is no longer wonderful that this venerated man performed his duties to universal acceptance, when we discern the spirit, better far than the *genius* of Socrates, from which he asked counsel. The ancients would have said of him, that he lived in the presence of all the Deities, since prudence was never absent from him. The holders of a better faith must say, that it was to no poetical deity, nor to the counsels of his own mind, but to that "grace" which his supplications invoked, that he owed his protection from most of the lapses to which fallible man is subject.

That "remnant of life" to which his last memorial refers, unfortunately for us, was short as he had predicted; but he walked it as he had done all that went before, according to his devout aspiration. He con-

tinued to preside in the Supreme Court with his accustomed dignity and effect, until the succeeding winter, when his constitution finally gave way, and after a short confinement, on Monday, the 30th of April, 1827, he closed his eyes for ever. It will be long, very long before we shall open ours, upon a wiser judge, a sounder lawyer, a riper scholar, a purer man, or a truer gentleman.

The *private life* of this eminent man, was the reflection of an unclouded mind, and of a conscience void of offence; and such external vicissitudes as marked it, did but ripen his virtues for their appropriate scene hereafter. The praise of his *public career*, is that it has been barren of those incidents which arrest the attention, by agitating the passions, of mankind. If it has grown into an unquestioned truth, that the poorest annals belong to those epochs which have been the richest in virtue and happiness, it may well be admitted that the best Judge for the people, is he who imperceptibly maintains them in their rights, and leaves few striking events for biography.

His course does not exhibit the magnificent variety of the Ocean, sometimes uplifted to the skies, at others retiring into its darkest caves,—at one moment gay with the ensigns of power and wealth, and at another strewing its shores with the melancholy fragments of shipwreck;—but it is the equal current of a majestic river, which safely bears upon its bosom the riches of the land, and reads its history in the smiling

cities and villages, that are reflected from its unvarying surface.

Such is the praise of the late Chief Justice Tilghman. He merited, by his public works and by his private virtues, the respect and affection of his countrymen; and the best wish for his country and his office is, that his mantle may have fallen upon his successor.